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No. 275

Supreme Court of the United States

OCTOBER TERM, 1926

BENJAMIN H. CLARK and CHARLES RIGGS, a Partnership doing business under the firm name of CLARK AND RIGGS,

Appellants,

v.

GEORGE T. POOR, C. C. MARSHALL, and FRANK B. MAULLAR, constituting THE PUBLIC UTILITIES COMMISSION OF OHIO,

Appellees.

REPLY BRIEF OF APPELLANTS.

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On the Brief.

Murray Seasongood,
Solicitor for Appellants.

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Appellees contend (Br. 6) that appellants have not been molested and that their drivers have not been arrested pursuant to any act of appellees, since the inspectors are appointed by the Ohio Director of Commerce. It should be sufficient answer to this argument merely to refer to the answer of appellees filed in this cause wherein they admit that they, "acting as the Public Utilities Commission of Ohio, are undertaking to enforce the provisions of the Motor Transportation Law of Ohio" (R. 11).

Again, appellees argue that appellants have an adequate remedy at law since, assuming they are not subject to the provisions of the Ohio Motor Transportation Law, they, and their drivers and employees, would have a defense against any charges or prosecutions. It is familiar law that when prevention of criminal prosecutions under an unconstitutional statute is essential to protect property rights, equitable jurisdiction exists to restrain such prosecutions. *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 500, 45 Sup. Ct. 141; *Packard v. Banton*, 264 U. S. 140, 44 Sup. Ct. 257; *Terrace v. Thompson*, 263 U. S. 197, 214, 44 Sup. Ct. 15; *Truax v. Raich*, 239 U. S. 33, 37. It is in evidence that appellants have a business which has a value in excess of $15,000, without including the value of the good will and trade which by their efforts they have been able to build up, and that the loss and injury to them incident to the enforcement of the Ohio Motor Transportation Law as alleged in their bill of complaint would be irreparable (R. 13).

In the brief for appellees, the statement is made that appellees have held that they must, upon application, grant an interstate certificate (Br. 4). Even if appellees had any right to require appellants first to apply for and obtain a certificate of public convenience and necessity as a condition precedent to engaging solely in interstate commerce in Ohio, which we deny, the record is undisputed that appellees would not grant such an interstate certificate upon application unless payment were made of the taxes on each vehicle, as provided by Section 614-94, and insurance policies or indemnity bond furnished, as provided by Section 614-89, and compliance with other regulations and orders of the commission as is required of intrastate haulers (R. 18-19).

The court below held as to appellants and the facts of this case that the provisions of the Ohio Motor Transporta-

tion Act with reference to insurance policies or indemnity bond are unreasonable and invalid (R. 22), and we contend, further, that the taxes imposed by said Act (Section 614-94) constitute a direct burden on interstate commerce and are, therefore, likewise invalid.

This Court has held that no certificate of public convenience and necessity is required as a condition precedent to engaging solely in interstate commerce. *Buck* v. *Kuykendall*, 267 U. S. 307, 45 Sup. Ct. 324; *Bush Co.* v. *Maloy*, 267 U. S. 317, 45 Sup. Ct. 326; *Crutcher* v. *Kentucky*, 141 U. S. 47. Although these cases hold that no certificate is required for interstate transportation, counsel for appellees make no attempt to discuss them or to show their non-applicability to the case at bar.

Since the brief for appellants was filed in this cause, the case of *Interstate Busses Corporation* v. *Holcomb*, 47 Sup. Ct. 298, was decided by this Court on January 3, 1927. Mr. Justice Butler, in the course of his opinion, said:

> "No licenses from local authorities or certificate of public convenience and necessity is required in respect of transportation that is exclusively interstate. Cf. *Buck* v. *Kuykendall*, 267 U. S. 307, 45 S. Ct. 324, 69 L. ed. 623, 38 A. L. R. 286; *Bush Co.* v. *Maloy*, 267 U. S. 317, 45 S. Ct. 326, 327, 69 L. ed. 627."

It follows, therefore, under the decisions of this Court, that the appellees are without legal power to require appellants first to apply for and obtain a certificate of public convenience and necessity. Moreover, appellees attached conditions to the granting of a certificate which conditions are in contravention of the "commerce clause" of the Constitution of the United States.

Appellees urge, with reference to the taxes required by the Ohio Motor Transportation Law, that "similar taxes have been sustained by this court," citing *Hendrick* v. *Mary*

land, 235 U. S. 610; *Kane v. New Jersey*, 242 U. S. 160 (Br. 5). These cases have been thoroughly considered in appellants' brief and the obvious differences clearly pointed out between the taxes involved in those cases and the taxes sought to be imposed by the statute under consideration in the case at bar.

The case of *Cannon Ball Transportation Company v. Public Utilities Commission of Ohio*, 113 O. S. 565, 149 N. E. 713, cited by appellees, held in effect that where a certificate of public convenience and necessity had been granted to an interstate carrier, the Public Utilities Commission could prohibit such carrier from receiving passengers in Ohio whose destinations are also within the state, that is, from doing an intrastate business under the guise of an interstate operation. The specific question as to whether the commission could require a common carrier, doing an interstate business exclusively, to obtain a certificate of public convenience and necessity as a condition precedent to engaging in such business was not considered or decided. The court merely held that the state authorities could compel interstate common carriers to comply with reasonable safety requirements and obey other regulations "which would not impose an unreasonable burden upon interstate commerce" (page 572). Whether the conditions attached by appellees to the granting of a certificate to an interstate common carrier are an unreasonable burden upon interstate commerce, and whether the taxes sought to be imposed by the Ohio Motor Transportation Law sustain any reasonable relation to the use of the highways of the state by interstate common carriers was not discussed.

CONCLUSION

We urge, therefore, that the appellees, constituting the Public Utilities Commission of the State of Ohio, can not

make the obtaining of a certificate of public convenience and necessity a condition precedent to engaging solely in interstate commerce; that no such certificate can be required in respect of transportation that is exclusively interstate; that the additional taxes imposed by *General Code of Ohio*, Section 614-94, are direct burdens on interstate commerce and appellants should not be required to pay them for the privilege of carrying on interstate commerce in Ohio; and that appellees should be enjoined from interfering in any manner with appellants' motor vehicles when engaged in Ohio solely in interstate commerce.

Respectfully submitted,

LESTER A. JAFFE,
On the Brief.

MURRAY SEASONGOOD,
Solicitor for Appellants.